BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOHN T. RYAN,** **Bar No. 006963** RESPONDENT.	No. 03-2224 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The State Bar filed a Complaint on July 2, 2004. Respondent filed an Answer on July 30, 2004. The Settlement Officer conducted a settlement conference on September 1, 2004, at which the parties reached a settlement. The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on October 19, 2004. The parties then filed an Addendum to Tender of Admissions and Agreement for Discipline by Consent. Initially, no hearing was held.

On December 3, 2004 this Hearing Officer filed a report recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent to the Disciplinary Commission. On January 26, 2005, the Commission rejected the Agreement and remanded the matter back to the Hearing Officer for further proceedings.

On March 7, 2005 an evidentiary hearing was commenced to allow for the presentation of testimony and additional evidence regarding the previously tendered agreement. The Respondent was sworn and examined by Bar Counsel and the Hearing Officer. In addition, four written statements were also reviewed and discussed at the hearing. These statements were admitted by stipulation of the parties on April 29, 2005.

On May 25, 2005 the parties filed a second tender of admission and agreement for discipline by consent and a joint memorandum in support of agreement for discipline by consent.

FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 17, 1981. Respondent was previously admitted to practice law in Ohio in 1964 and Texas in 1978.

2. Respondent has an accounting background that included an "undergraduate" as a "CPA" and six years working for a "major accounting firm". Reporter's Transcript of Proceedings (RTP), March 7, 2005, 8:20-25.

3. Respondent is 76 year of age.

4. Respondent is in the process of winding down his practice. However, he has not finalized a date for closing his practice.

client trust account.

6. The December 4, 2003 bank notice indicated that, on December 2, 2003, check number 2909 for $500.00 and check number 2910 for $61.00 attempted to pay against the trust account when the balance at the time was $170.97.

7. Bank One paid both checks and charged Respondent a $56.00 overdraft fee; thereby overdrawing Respondent's trust account by a total of $446.03.

8. On December 12, 2003, the Staff Examiner for the State Bar of Arizona ("the Staff Examiner") sent Respondent a copy of the insufficient funds notice with a letter requesting Respondent submit an explanation regarding the overdraft on his client trust account.

9. On January 14, 2004, Respondent hand-delivered his response dated December 30, 2003 to the State Bar of Arizona.

10. In his December 30, 2003 response, Respondent stated:

> *The over draft in my trust account is the result of a check written to pay bond cost of $500.00 on an Appeal to the Arizona Court of Appeals. I was aware the trust account was short by about $400.00 when the check was written, however I thought I would be able to cover the shortage the next day. Unfortunately funds did not come in to avoid the overdraft.*

11. In his December 30, 2003 response, Respondent also stated:

> *The problem arose when the client filing the appeal sent me a check for $575.00 which I applied to his balance due me for services rendered. His intention was that the payment was an advance on the appeal. I filed for the appeal on the last day of the time for filing and had no choice but to try to be timely in filing for the appeal. Fortunately the bank honored the $500.00 check. At the end of November my client owed me $900.00 for services rendered.*

12. On January 15, 2004, the Staff Examiner sent Respondent a letter requesting trust account records including: Respondent's trust account bank statement; cancelled checks, duplicate deposit slips, and individual client ledgers corresponding to the December 2003 statement. The Staff Examiner also requested additional information including an explanation as to why Respondent did not advance the $500.00 from his operating account; and requested an accounting of the funds on deposit in the account when checks 2909 and 2910 attempted to pay against the account.

13. By letter dated February 4, 2004, Respondent provided a copy of his December 2003 trust account bank statement, and two billing statements for his client, Al Swanson.

14. In his letter dated February 4, 2004, Respondent stated that he did not transfer funds from his operating account to cover the overdraft in the trust account because there wasn't enough money in the operating account and stated

that the insufficient funds checks 2909 and 2910 were disbursements for costs and the bond for the appeal of Al Swanson's case.

15. Respondent's letter of February 4, 2004 did not provide the individual client ledgers as requested by the Staff Examiner.

16. On February 6, 2004, the Staff Examiner sent Respondent a letter requesting that he explain whose money made up the beginning balance as reflected on the December 2003 bank statement and requested he provide documentation in support of his explanation.

17. By letter dated February 23, 2003, Respondent asserted that the December 2003 balance did not consist of any client funds and that, during the last week of November 2003, he deposited $300.00 of "non trust funds" into the account.

18. On an occasion prior to the conduct alleged herein, in connection with State Bar File No. 00-1073, as a result of conduct which led to a bank report of an overdraft to Respondent's trust account, Respondent was ordered to diversion and attended the Trust Account Ethics Enhancement Program ("TAEEP") sponsored by the State Bar as an alternative to a sanction for violations of ER 1.15 and Rules 43 and 44, Ariz. R.S.Ct.

19. Subsequent to Respondent's attendance and successful completion of diversion and TAEEP in State Bar File No. 00-1073, another report of an

overdraft to Respondent's trust account was received by the State Bar in File No. 02-1358 and Respondent was again found to have violated ER 1.15 and Rules 43 and 44, Ariz. R. S. Ct. As a result, Respondent received an Informal Reprimand and an Order of Probation on July 24, 2003.

20. For purposes of this consent agreement, Respondent conditionally admits that he failed to abide by a client's decisions concerning the objectives of the representation by failing to use funds advanced by the client for the purpose for which the funds were advanced.

21. For purposes of this consent agreement, Respondent conditionally admits that he failed to hold the client's property separate from his own property and failed to maintain client funds in a separate account.

22. For purposes of this consent agreement, Respondent conditionally admits that he failed to maintain his trust account in accordance with the minimum guidelines established by the Board of Governors of the State Bar ("Trust Account Guidelines") in effect during the time in question, and in particular failed to exercise due professional care in the performance of his duties under the Trust Account Guidelines.

23. For purposes of this consent agreement, Respondent conditionally admits that he failed to have internal controls within his office adequate to safeguard funds held in trust.

24. For purposes of the consent agreement, Respondent conditionally admits that he failed to maintain complete trust account records and failed to deposit funds received from his client as costs and filing fees intact into his trust account.

25. Between January 2004 and April 2004 Respondent was asked for additional trust account records. For purposes of this consent agreement, the State Bar conditionally agrees that Respondent did not willfully fail to respond to a request for information from the State Bar Staff Examiner and the State Bar does not plan to use this fact in aggravation. Since the filing of the formal complaint Respondent has fully cooperated with the State Bar.

26. Based on Respondent's course of conduct prior to the conduct alleged herein, including his prior completion of TAEEP, his receipt of an informal reprimand and probation in File No. 02-1358 for violations of ER 1.15 and Rules 43 and 44, including related violations of the Trust Account Guidelines, at the time of the conduct described herein, for purposes of this consent agreement, Respondent conditionally admits that he knew or should have known he was dealing improperly with client property and that his conduct caused injury or potential injury to a client.

27. The Respondent has shown substantial evidence of good character and has a good reputation for professional competence.

28. The Respondent has expressed sincere remorse for his actions.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct violated Rule 42, Ariz. R. S. Ct., specifically ER 1.2, ER 1.15 and Rules 43 and 44, Ariz. R. S. Ct.

Respondent has indicated it was his understanding that the client intended to have the advance applied to the appeal. (*See*, ¶ 10 above.) The State Bar conditionally admits their is evidence that at the time the respondent applied the client's funds to the clients outstanding bill, respondent felt it was appropriate to do so because he felt the appeal was not a separate matter. *See*, RTP, 16:3-17:13.

ABA STANDARDS

The ABA *Standards for Imposing Lawyer Sanctions* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. ABA *Standard* 1.3, Commentary. The court and commission consider the *Standards* a suitable guideline. *In re Peasley*, 427 Ariz. Adv. Rep. 23, 90 P.3d 764, §§ 23, 33 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the

actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.

In the instant case, a review of the Respondent's Client Trust Account records by the State Bar's Staff Examiner revealed that Respondent had commingled personal and client funds in the client's trust account, that Respondent issued a check against the account knowing there were insufficient funds in the account for an appeal by applying the advance to the client's unpaid bill without the client's permission. Respondent knew that he was dealing improperly with client property and that there was a potential injury to the client. RTP, March 7, 2005, 23:20-23.

Given the conduct in this matter, it is appropriate to consider *Standard* 4.1 (Failure to Preserve the Client's Property).

Standard 4.12 provides:

> Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Standard 4.13 provides:

> Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Due to Respondent's prior disciplinary sanction that included a finding that Respondent violated ER 1.15 (Safekeeping Property) and Rules 43 and 44,

Ariz. R. S. Ct., the parties also agree that it is appropriate to consider *Standard* 8.0 (Prior Discipline Orders) which is helpful in determining the appropriate sanction in cases involving prior discipline.

Standard 8.3 provides:

> Reprimand [censure in Arizona] is generally appropriate when a lawyer:
> . . . .
> (b) has received an admonition[informal reprimand in Arizona] for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system or the profession.

Standard 8.2 provides:

> Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

AGGRAVATING AND MITIGATING FACTORS

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer agrees with the parties that three aggravating factors apply and should be considered in this matter. The applicable aggravating factors are:

Standard 9.22(a) prior disciplinary offenses;

Standard 9.22(c) a pattern of misconduct; and

Standard 9.22(j) substantial experience in the practice of law.

Prior disciplinary offenses and substantial experience in the practice of law are a matter of record. A pattern of misconduct is demonstrated by Respondent's

prior conduct and discipline, commingling of personal funds with client funds, misapplication of client funds and intentional over draft of his trust account in this matter.

This Hearing Officer agrees with the parties that four mitigating factors as set forth in Standard 9.32. are present. Those factors are:

> Standard 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> Standard 9.32(e) full and free disclosure to a disciplinary board or cooperative attitude toward proceedings;
>
> Standard 9.32(g) character or reputation; and
>
> Standard 9.32(l) remorse.

Respondent's good faith effort to rectify the consequences of his misconduct is demonstrated by the fact Respondent replenished his trust account with his own funds after over-drafting it to fund the appeal bond. Although Respondent did not provide individual client ledgers, as requested by the Staff Examiner, in his letter of February 4, 2004, Respondent has been cooperative with the Bar since the filing of the formal Complaint. The exhibits and testimony that were admitted at the hearing on March 7, 2005 presented ample evidence of good character and reputation. These statements were from individuals who were familiar with the Respondent's character and practice for a substantial length of time.

Respondent has expressed a willingness to accept whatever sanction is deemed appropriate. He acknowledges a goal to modify his practice to prevent a recurrence of the problems presented by the charge herein. Lastly, as previously noted Respondent has demonstrated that he is remorseful for his acts.

On the other hand, the current violations occurred less than six months after Respondent received an Informal Reprimand (July 24, 2003) for virtually the same conduct that brings him here today. That prior conduct resulted in him being placed on probation for an undisclosed amount of time.

In addition, the July 2003 sanction was preceded by an earlier problem (00-1073) that arose from another reported overdraft. This resulted in Respondent being allowed to participate in the State Bar's diversion program. The Respondent was ordered to attend the Trust Account Ethics Enhancement Program ("TAEEP") sponsored by the State Bar. This was as an alternative to a sanction for violations of ER 1.15 and Rules 43 and 44, Ariz. R.S.Ct.

PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra*, ¶¶ 33, 61. However, the discipline in each case must be tailored to the individual case, as neither perfection nor

absolute uniformity can be achieved. *Id.* at ¶ 61 (citing *In re Alcorn,* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

ABA *Standard* 4.12 indicates the presumptive sanction for Respondent's conduct is a suspension. The Respondent and the State Bar in their Tender of Admissions and the Joint Memorandum urge that censure is an appropriate and proportional sanction for the Respondent's conduct. This Hearing Officer does not agree.

The Joint Memorandum in support of censure cites to *In re Baskerville*, Supreme Court No. SB-03-0006-D, Disciplinary Commission No. 01-1511, (2003); *In re Crocker, SB-03-0077-D; In re Kazragis*, Supreme Court No. SB-03-0115-D, Disciplinary Commission No. 02-0157and *In re McVay*, Supreme Court No. SB-03-0018-D. Censure was the approved sanction in these cases. However, all of these cases involved a *negligent* mental state. The Respondent's mental state was that of *knowing* misconduct.

The Joint Memorandum cites *In re Lopez*, Supreme Court No. SB-03-0012-D, as a case where the Respondent was censured for a *knowing* violation.

Lopez had violated ER 1.15 and had a prior informal reprimand for violating ER 8.1 and Rule 51(h) and (i)[1], Ariz. R. S. Ct..

Two significant differences distinguish *In re Lopez* from the instant matter. The first difference involves the nature of the prior discipline. Respondent Lopez' prior discipline was for violating ER 8.1, not ER 1.15. This is contrasted to Respondent Ryan who has a prior Informal Reprimand for violating ER 1.15 *and* a prior trust account incident that resulted in a diversion disposition (attendance at the Trust Account Ethics Enhancement Program).

The second distinction is more crucial. Respondent Lopez had closed his law practice. Accordingly, the need to protect the public from his actions was no longer present. The guiding light must be that the "purpose of disciplining lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the persons disciplined, *Matter of Kali*, 124 Ariz. 592, 595, 606 P.2d 808, 811 (Ariz., 1980). The goal of protecting the public cannot be adequately met by the proposed sanction.

Other cases for a *knowing* violation of ER 1.15 have resulted in suspension. One example is *In the Matter of a Member of the State Bar, Carl Retter*, 180 Ariz. 515, 885 P.2d 1080 (1994). *Retter* involved a *knowing* violation of ER

---

[1] Rule 53(f) and (d), respectively, Ariz. R. S. Ct. effective December 1, 2003

1.15. There, the IRS had placed a tax lien on Respondent's business account. This made it impossible for Respondent Retter to use his business account. He then deposited personal funds in his trust account. At that time, the Respondent did not believe there were any client funds in the trust account. This belief was mistaken as Retter's associate had deposited monies belonging to one of her clients into the account. When Retter later made a withdrawal, an overdraft of $178.37 resulted. *Id.*, 517. This overdraft existed for approximately one day. *Id.* The Commission found no aggravating factors and several mitigating factors. A suspension of 120 days was imposed.

In the Matter of a Member of the State Bar, Charles Ray Brooks, 175 Ariz. 142, 854 P.2d 776 (1993) also involved a knowing violation of ER 1.15. Respondent Brooks failed to keep client funds in his trust account. Clients suffered no loss. The Respondent had no prior disciplinary history. Mitigating factors were present and the lack of any other aggravating factors was noted. The Commission ordered a thirty-day suspension.

RECOMMENDATION

The objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985).

It is also Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

As noted above, the presumptive sanction under Standard 4.12 is suspension. One of the aggravating factors merits additional comment, i.e., the Respondent's disciplinary history. The Respondent's previous sanction and term of probation for virtually the same type of conduct was imposed less than 6 months prior to the instant matter. The question must be asked, did the prior sanction adequately protect the public? More importantly, can the proposed censure and a new term of probation adequately protect the public now? As a practical matter, the proposed sanction is not radically different than the sanction imposed in July of 2003. More troubling was that the July 2003 sanction was imposed after the Respondent had recently completed the State Bar's Trust Account Ethics Enhancement Program. This is a track record that cannot be ignored. The duty to protect the public requires that this not be ignored.

In addition, it is this hearing officer's view that the mitigating factors do not outweigh the aggravating factors such as to override the suggested sanction of *Standard 4.12*.

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends a modification of the Tender of Admissions and Agreement for Discipline by Consent in the following manner:

1. Respondent should be suspended for sixty days.

2. Respondent should be placed on probation for a period of two years after reinstatement and on the signing of a probation contract. The two year period of probation shall commence upon the date of the signing of the probation contract by Respondent.

3. The two year period of probation should have the following terms:

    a. Respondent shall undergo a Law Office Management Assistance Program (LOMAP) assessment.

    b. Respondent shall comply with all of the recommendations made in the assessment.

    c. Respondent shall be have a practice monitor (PM) assigned to monitor his practice.

In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

4. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 8th day of July, 2005.

Neal C Taylor

Neal C. Taylor
Hearing Officer 8I

Original filed with the Disciplinary Clerk
this 8th day of July, 2004.

Copy of the foregoing was mailed
this 11th day of July, 2004, to:

John T. Ryan
Respondent
3440 North 16th Street, Suite 5
Phoenix, AZ 85016

Loren J. Braud
Senior Bar Counsel
State Bar of Arizona
4201 N. 24th St., Suite 200
Phoenix, AZ 85016-6288

by: PWilliams